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**Will a caveat lapse when a proceeding to establish the interest claimed is struck out?**

Section 126(4) of the *Land Title Act 1994* (Qld) provides, in part, that if a caveator does not want a caveat to which the section applies to lapse, the caveator must start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat within the relevant statutorily prescribed time period. However, there is no provision in the statute that regulates a situation where proceedings are started within time but are later struck out.

***Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2009] QCA 134.**

The effect of proceedings being started within time but later being struck out arose for consideration by Court of Appeal in *Allen's Asphalt Pty Ltd v SPM Group Pty Ltd* [2009] QCA 134. In this instance, Allen's Asphalt Pty Ltd ("AAPT") lodged a caveat over SPM's land to secure a debt alleged to be due under a credit agreement in which SPM had agreed to charge all their equitable interest in freehold or leasehold property in favour of AAPT. Ultimately, the debt was only \$3,158.44 and related solely to legal costs. Within three months of lodging the caveat, AAPT filed a claim against SPM in the Supreme Court for a declaration that it held an interest as equitable chargee of the land. AAPT did not serve the claim on SPM. Over a year later, AAPT filed an application for an order that the claim filed be renewed which application was duly served on SPM. SPM responded by filing an application, to be heard together with AAPT's application, for orders that AAPT's caveat be removed and that AAPT's claim be struck out. Both applications were heard and determined on the same day.

The primary judge was concerned that AAPT had brought an action for such a small amount in the Supreme Court instead of in the Magistrates Court. His Honour considered that the dispute between the parties as to whether SPM was liable to pay the money claimed should be determined in the Magistrates Court. If successful in the Magistrates Court, AAPT could then bring its claim in the Supreme Court for a declaration that it had a charge over SPM's property, and for orders to sell SPM's land and use the proceeds towards satisfying the debt claimed. For these reasons, the primary judge refused to renew AAPT's Supreme Court claim but as the judge considered AAPT arguably had a caveatable interest the application to have the caveat removed was dismissed. However, in his *ex tempore* reasons the primary judge did not advert to the effect of the Supreme Court proceedings being struck out namely that AAPT would not have "a proceeding in a court of

competent jurisdiction to the establish the interest claimed under the caveat” within three months after lodgement of the caveat.

SPM appealed contending that the primary judge erred in refusing to order the removal of the caveat when AAPT’s court proceedings, which it relied on to establish its caveatable interest, were to be struck out. In a split decision (McMurdo P dissenting), the Court of Appeal dismissed the appeal.

All judges agreed that s 126(4) does not state that a caveat lapses in circumstances where a caveat has been lodged for more than three months and a proceeding has been started in court of competent jurisdiction but has then been subsequently struck out. However, McMurdo P (dissenting) opined, despite this statutory hiatus, that this must be the intended effect of the statutory scheme. By contrast, the majority judges (Muir JA with the agreement of Daubney J) considered that such a conclusion would require, impermissibly, that s 126(5) of the *Land Title Act 1994* (Qld) be read as if it contained before the words “the caveat lapses” the following additional words, or words to similar effect, “or if a proceeding commenced within the time required by subsection (4) is concluded for any reason and there is not extant any other such proceeding.”

Further, the majority did not accept the contention that the role of the caveat may be subverted if a caveat could be permitted to exist in the absence of proceedings brought to confirm the interest claimed. In this regard, it was noted that the Supreme Court had ample power under s 127 of the *Land Title Act 1994* (Qld) to remove a caveat which ought not to remain.

### **Comment**

The decision of the Court of Appeal is reflective of the delicate balance of judicial reasoning that can arise in circumstances of a statutory hiatus. Although the factual situation encountered in this instance will arise infrequently, legislative amendment may still be considered appropriate.